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In the Supreme Court of the United States

OCTOBER TERM, 1979

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.,
PETITIONERS

v.

GLOVER CONSTRUCTION COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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The issue in this case is whether the Buy Indian Act, 25 U.S.C. 47, authorizes the Secretary of the Interior to negotiate with a wholly-owned Indian corporation for the construction of a road in an Indian area subject to regulation by the Bureau of Indian Affairs. In our opening brief (pages 17-26, 31-33) we showed that the language, legislative history, and purpose of the Act compel the conclusion that Congress intended the Act to apply to a broad range of economic activities, including construction work of any kind. In addition, we pointed out that, ever since the Act was passed in 1910, the Bureau of Indian Affairs has consistently construed the Act to cover road, irrigation and other similar construction projects (*id.* at 27-31). Although conceding (Br. 17) that "electronic calculators, typewriters, computers, or

anything else for sale in the market place" falls within the scope of the Act, respondent nonetheless contends that road construction does not. We submit that nothing in the authorities cited by respondent supports this artificial distinction between goods and construction.[1]

a. Respondent correctly observes that the Buy Indian Act was enacted as part of an advertising statute concerning the Indian Service, BIA's predecessor. See Act

[1]At the outset, we note that respondent repeatedly mischaracterizes the Buy Indian Act program in general and the Indian Nations contract in particular. Respondent intimates (Br. 2-3 n.1, 21 & n.5) that Buy Indian contracts, such as the road construction contract involved in this case, do not create economic opportunities for Indians, except perhaps for the nominal owners of an Indian corporation. But Indian Nations Construction Company is owned and managed by three Indians. (For example, the record in this case shows that Nat Marshall, an Indian, and not Hubert Day, the non-Indian construction superintendent, negotiated the Honobia Road contract with BIA (Wing Dep. 10-14, 42-44; Donahoe Dep. 8-11).) Moreover, although BIA did not ascertain how many Indian laborers are employed by Indian Nations, the Honobia Road contract, in accordance with BIA regulations, required that Indian Nations give preference to Indian workers (see Wing Dep. 42-44; contract paragraphs 25, 30, add. 32, add. 37; 44 Fed. Reg. 62510-62515 (1979) (to be codified at 41 C.F.R. 14-1 through 14-7)), and a BIA engineer testified that, while inspecting the construction site, he noticed that at least some of the laborers were in fact Indians. Furthermore, as we discussed in our opening brief (page 33 & n.29), the decision of the court below has resulted in a virtual halt in BIA's Buy Indian road contracting, thereby forcing several Indian firms out of business.

of June 25, 1910, ch. 431, Section 23, 36 Stat. 861.[2] Because the general advertising requirement applied to "purchase of Indian supplies," respondent argues (Br. 16) that "the scope of [the Buy Indian Act] is limited to the purchase of Indian supplies." Since, in respondent's view, "supplies" denotes only movable items or goods, road construction work is not covered by the Buy Indian Act. In other words, the Buy Indian preference established in the second sentence of Section 23 must apply only to the limited type of transactions discussed in the first sentence of that statute. We disagree.

Insofar as "Indian supplies" defines the scope of the Buy Indian preference established in the second sentence of the Act, it applies equally to the employment of "Indian labor" as well as to the purchases of the "products of Indian industry." It is thus apparent that Congress did not intend the phrase "Indian supplies" to limit the Act to preferential purchases of blankets, foodstuffs or other goods. Moreover, the legislative history makes clear that Section 23 was intended to "bring the Indian Service * * * under the provision of [the general advertising statute]" (H.R. Rep. No. 1135, 61st Cong., 2d Sess. 12 (1910)), and that "Indian supplies" was simply a shorthand reference

[2]Section 23 provided in full:

> That hereafter the purchase of Indian supplies shall be made in conformity with the requirements of section thirty-seven hundred and nine of the Revised Statutes of the United States: *Provided*, that so far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior. All Acts and parts of Acts in conflict with the provisions of this section are hereby repealed.

for all Indian Service contracting, which even at that time included the construction of roads, buildings, and irrigation works. See *id.* at 5-6, 12; Act of June 25, 1910, ch. 431, Sections 13 and 17, 36 Stat. 858 and 860; 45 Cong. Rec. 6097, 8900, 8981 (1910).[3]

b. Likewise, nothing in the legislative history cited by respondent suggests that the Buy Indian Act applies solely to goods. Indeed, the respondent's discussion (Br. 10-13) of the legislative history is wholly irrelevant. To be sure, Congress in 1910 attempted to curb the abuses that had characterized the Indian Service's purchases in the past. But those abuses involved unadvertised procurement from *non-Indian* enterprises under the exemptions for small and exigency purchases. This case, of course, concerns preferential purchases from *Indian* firms. And as to that issue, the legislative history is unequivocal: Congress meant to preserve the broad preference for Indian labor and Indian entrepreneurs that had existed in one form or another since at least 1886. See, *e.g.*, H.R. Rep. No. 1135, *supra*, at 12; 45 Cong. Rec. 6097 (1910) (remarks of Rep.

[3]Respondent erroneously asserts (Br. 14) that Congress did not fund road building on Indian reservations until 1935. In fact, the 1908 Indian Appropriations Act specifically authorized the construction of "a wagon road on the Hoopa Valley Indian Reservation." Act of Apr. 30, 1908, ch. 153, 35 Stat. 77. That federal funds were commonly used to construct roads on Indian reservations in Indian areas is also reflected in numerous legislative and administrative reports. See, *e.g.*, S. Rep. No. 278, 60th Cong., 1st Sess. 18-19 (1908); 42 Cong. Rec. 3253, 4561, 4565, 4566-4567, 5020 (1908); *Annual Report of the Commissioner of Indian Affairs* 12-13 (1907), reprinted in II *Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1907; Annual Report of the Commissioner of Indian Affairs* 17 (1911), reprinted in II *Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1911.*

Burke); 42 Cong. Rec. 1695 (1908) (remarks of Rep. Sherman); Act of May 15, 1886, ch. 333, Section 3, 24 Stat. 46. See generally Pet. Br. 20-26.[4]

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

WADE H. MCCREE, JR.
Solicitor General

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[4]Respondent also suggests (Br. 18-22) that the Secretary's interpretation of the Act is not entitled to deference because it is not longstanding. The factual inaccuracy of this contention has already been pointed out in our opening brief (pages 27-29). We further note that even non-contemporaneous administrative constructions are entitled to significant weight in appropriate circumstances. See, *e.g.*, *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, No. 78-1651 (Feb. 20, 1980), slip op. 22-23 (agency interpretation factor to be considered even though not promulgated until 28 years after enactment of legislation).